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7 TERRANCE AMONS, et al.,  
8 Plaintiffs,  
9 v.  
10 PITTSBURG CITY OF, et al.,  
11 Defendants.

Case No. [4:19-cv-00301-KAW](#)

**ORDER DENYING PLAINTIFFS'  
MOTION TO CERTIFY  
DEFENDANTS' APPEAL AS  
FRIVOLOUS; ORDER STAYING CASE  
PENDING APPEAL**

Re: Dkt. No. 67

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13 On June 11, 2020, the Court denied Defendants City of Pittsburg, Jesus Arellano, and  
14 Dillon Tindall's motion for summary judgment. On July 10, 2020, Defendants appealed the denial  
15 of qualified immunity with respect to the officers' alleged use of excessive force. On July 15,  
16 2020, Plaintiffs filed the instant motion to certify the appeal as frivolous.

17 Upon review of the moving papers, the Court finds this matter suitable for resolution  
18 without oral argument pursuant to Civil Local Rule 7-1(b), and, for the reasons set forth below,  
19 DENIES Plaintiff's motion to certify the appeal as frivolous.

20 **I. BACKGROUND<sup>1</sup>**

21 On June 11, 2020, the Court denied Defendant's motion for summary judgment. On July  
22 10, 2020, Defendants City of Pittsburg, Jesus Arellano, and Dillon Tindall timely filed a notice of  
23 appeal challenging the denial of qualified immunity with respect to the officers' alleged use of  
24 excessive force. (Dkt. No. 65.)

25 On July 15, 2020, Plaintiffs filed a motion to certify the appeal as frivolous. (Pls.' Mot.,  
26 Dkt. No. 67.) On July 29, 2020, Defendants filed an opposition. (Defs.' Opp'n, Dkt. No. 72.) On

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28 <sup>1</sup> The Court hereby incorporates the factual background set forth in the Order Denying  
Defendants' Motion for Summary Judgment. (6/11/20 Order, Dkt. No. 62.)

1 August 2, 2020, Plaintiffs filed a reply and a request for judicial notice. (Pls.' Reply, Dkt. No. 73;  
2 Pls.' RJN, Dkt. No. 74.)<sup>2</sup>

## 3 II. LEGAL STANDARD

4 Generally, a district court's denial of qualified immunity is immediately appealable.  
5 *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). Such an appeal "divests the district court of  
6 jurisdiction to proceed with trial" on the issues involved in the appeal. *Chuman v. Wright*, 960  
7 F.2d 104, 105 (9th Cir. 1992). Under appropriate circumstances, however, a district court may  
8 certify an appeal as frivolous and proceed to trial. *Padgett v. Wright*, 587 F.3d 983, 985 (9th Cir.  
9 2009) (per curiam). A "frivolous qualified immunity claim is one that is unfounded, 'so baseless  
10 that it does not invoke appellate jurisdiction.'" *Marks v. Clarke*, 102 F.3d 1012, 1017 n.8 (9th Cir.  
11 1996) (quoting *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989)).

## 12 III. DISCUSSION

13 Plaintiffs argue that the appeal should be certified as frivolous because: (1) the officers'  
14 appeal is based on disputed issues of fact; and (2) the appeal is "a ploy to play games with the trial  
15 schedule." (Pls.' Mot. at 5-6.)

### 16 A. Whether the appeal is frivolous due to the existence of disputed facts.

17 Plaintiffs argue that the interlocutory appeal is frivolous because there are genuine disputes  
18 of material fact. (Pls.' Mot. at 5.) The Court disagrees.

19 "The mere presence of disputed facts—without more—does not render such an appeal  
20 frivolous." *Martinez v. City of Pittsburg*, No. 17-CV-04246-RS, 2019 WL 1491676, at \*1 (N.D.  
21 Cal. Apr. 4, 2019) (citing *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 945 (9th Cir.  
22 2017); *Ames v. King Cty.*, 846 F.3d 340, 347 (9th Cir. 2017)). Here, Defendants challenge  
23 whether, viewing the evidence in the light most favorable to Plaintiffs, the officers are still entitled  
24 to qualified immunity as a matter of law. (Def.'s Opp'n at 5-6.) Specifically, Defendants contend  
25 that the undersigned failed to recognize that Decedent's reaching in the handgun's vicinity was the

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27 <sup>2</sup> The Court denies Plaintiffs' request for judicial notice on the grounds that it was filed in  
28 connection with the reply, thereby denying Defendants an opportunity to oppose it. Furthermore,  
the documents have no bearing on the pending motion.

1 issue in this case regardless of whether he intended to unbuckle his seatbelt or reach for the gun.  
 2 See *id.* at 6.<sup>3</sup> This is not a sham argument, and is, therefore, not frivolous. See *Marks v. Clarke*,  
 3 102 F.3d at 1017 n.8; see also *Apostol*, 870 F.2d at 1339.

4 Moreover, that the district court is of the opinion that Defendants are unlikely to prevail on  
 5 appeal also does not render it frivolous. To find otherwise would divest the Ninth Circuit of  
 6 jurisdiction if the district court made a frivolity finding to remain consistent with its denial of  
 7 summary judgment. Regardless of the undersigned's opinion on the merits, the Court agrees with  
 8 Defendants that this appeal should be resolved by the Ninth Circuit. (See Defs.' Opp'n at 5.)

9 Accordingly, the existence of disputed facts does not render the appeal frivolous.

10 **B. Whether the appeal is a ploy to disrupt the trial schedule.**

11 Plaintiffs argue that Defendants filed the appeal merely to delay the trial schedule based on  
 12 the fact that Defendant City of Pittsburg recently lost a similar appeal involving "integral  
 13 participation." (Pls.' Mot. at 6; Pls.' Reply at 6.) In opposition, Defendants argue that they are  
 14 acting in good faith and that, due to the pandemic, jury trials cannot go forward anyway, so there  
 15 is no viable trial schedule to disrupt. (Defs.' Opp'n at 9.)

16 Whether a defendant is entitled to qualified immunity depends on the facts of the case, and  
 17 *Martinez v. City of Pittsburg* involved several officers restraining the decedent. Ninth Circuit  
 18 Mem., No. 19-15550, 17-cv-04246-RS (Jun. 18, 2020), ECF No. 101. Given that the legal  
 19 determination is fact specific, Defendants' knowledge that the *Martinez* appeal was unsuccessful,  
 20 without more, does not mean that this appeal was filed for the purposes of delay.

21 Thus, the undersigned does not find that the appeal was filed to delay the proceedings.

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 24 <sup>3</sup> That Defendants' qualified immunity argument regarding Officer Arellano did not address the  
 25 reaching argument is an issue for the appellate court to resolve. In the motion for summary  
 26 judgment, Defendants simply argued that Officer Arellano "did not use any force, deadly or  
 27 otherwise, and had no meaningful involvement in Officer Tindall's decision to use deadly force."  
 28 (Dkt. No. 43 at 23.) While there may be a valid argument that Officer Arellano is entitled to  
 qualified immunity, Defendants did not make one, and it is surely not the trial court's  
 responsibility to make arguments for the moving party. Thus, since Officer Arellano did, as a  
 matter of law, use a high level of force in pointing his firearm at and giving commands to  
 Decedent, the Court found that he was not entitled to qualified immunity. (6/11/20 Order at 7.)

#### IV. CONCLUSION

For the reasons set forth above, Plaintiffs' motion to certify the appeal as frivolous is DENIED.

Additionally, the case is STAYED under the court's inherent powers pending the outcome of the appeal to conserve judicial resources. The parties are, however, encouraged to engage in alternative dispute resolution efforts at either the appellate or district court levels.

IT IS SO ORDERED.

Dated: September 14, 2020

Kandis Westmore  
KANDIS A. WESTMORE  
United States Magistrate Judge

United States District Court  
Northern District of California